No. 18450

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KEITH NUCATOLA,

Appellant,

vs.

ROBERT F. KENNEDY, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

FRANCIS C. WHELAN,
United States Attorney,

DONALD A. FAREED,
Assistant U. S. Attorney,
Chief of Civil Section,

DZINTRA I. JANAVS,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 18450

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KEITH NUCATOLA,

Appellant,

vs.

ROBERT F. KENNEDY, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

Jurisdiction.

Appellant, petitioner below, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of California. Said petition was denied by Honorable William C. Mathes on November 5, 1962.

The court below had jurisdiction over appellant's action under 28 U. S. C. 2241. The order of the District Court being a final order, jurisdiction is conferred upon this court by 28 U. S. C. 2253.

Statement of the Case.

On November 2, 1962, appellant filed a Petition for Writ of Habeas Corpus *in propria persona* in the the United States District Court for the Southern District of California, naming as respondents Robert F. Kennedy, Attorney General of the United States, James V. Bennett, Director of the Bureau of Prisons of the

United States of America, G. V. Richardson, Warden of the U. S. Correctional Institution of Lompoc, California, and Edwin Friedman and Fred Aiken, Associate Wardens of said institution.

In his petition, appellant alleged, *inter alia,* that said persons, whom he calls "agency", have "promoted an overt and manifest prejudice against the plaintiff, characterizing him as both intractable and incorrigible, . . . have frustrated every major effort which the plaintiff has made to establish his own rehabilitation . . . have defamed his personality with slander . . . have caused him corporal harm, subjected him physically and mentally to deleterious conditions", and otherwise similarly mistreated, abused and harrassed him [Tr. 4-6].

In the petition appellant admits also that "for a period of time I was regularly involved in clashes with this authority", and speaks about some of his prison conduct as "the impediment of my past conduct" [Tr. 8]. He does not claim that his detention is illegal and does not ask to be released from prison.

On November 5, 1962, the court below entered its order denying appellant's Petition for Writ of Habeas Corpus. The present appeal is from that order.

Issue Presented.

Did the United States District Court err in denying appellant's Petition for Writ of Habeas Corpus?

Statutes Involved.

28 U. S. C. 2241, as relevant, reads as follows:

> "*Power to grant writ.*
>
> (a) Writs of habeas corpus may be granted by . . . district courts . . .".

ARGUMENT.

The United States District Court Properly Denied Appellant's Petition for Writ of Habeas Corpus.

A. The Writ of Habeas Corpus May Be Utilized Only to Inquire Into the Legality of Detention.

While courts are given statutory jurisdiction to grant writs of habeas corpus [28 U. S. C. §2241], a petition for the writ, however, is always addressed to the court's discretion [*Snow v. Roche,* 143 F. 2d 718 (9th Cir. 1944), cert. den. 323 U. S. 788]. 28 U. S. C. 2243, as relevant, provides:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, *unless it appears from the application that the applicant or person detained is not entitled thereto.*" (emphasis supplied).

From the application filed by the appellant, and made part of the record before this court, it is clear that the appellant was not entitled to an award of the writ.

It is well established that the writ historically and within the meaning of 28 U. S. C. 2241 is to be granted only to inquire into the legality of detention, and may not be used as a means of securing determination of judicial questions which, if determined in petitioner's favor, would not result in his immediate release. [*McNally v. Hill,* 293 U. S. 131 (1934); *Snow v. Roche, supra.*] In the *Snow* case, at page 719, this court quoting with approval from the *McNally* case, declared:

> "There is no warrant in either the statute or the writ for its use to invoke judicial determina-

> tion of questions which could not affect the lawfulness of the custody and detention . . . Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.
>
> Such use of the writ in the (United States) federal courts is without the support of history or of any language in the statute which would indicate a purpose to enlarge its judicial function. * * *"

The courts, including this court, have repeatedly stated that they have no jurisdiction to superintend the discipline and care of prisoners and that treatment of prisoners is certainly not properly reviewable pursuant to a petition for habeas corpus as it would not affect a release of the prisoner if the court should find that the petitioner's allegations were true. [*Snow v. Roche, supra; Williams v. Steele,* 194 F. 2d 32 (8th Cir. 1952); reh. 194 F. 2d 917, cert. den. 344 U. S. 822; *Stroud v. Swore,* 187 F. 2d 850 (9th Cir. 1951); *Application of Hodge,* 262 F. 2d 778 (9th Cir. 1958), affirming *Hodge v. Heinze,* 165 F. Supp. 726 (N.D. Cal. 1958)].

A case particularly in point and similar to the case before this court, on its facts, is *Snow v. Roche, supra.* In that case the petitioner did not question the legality of his custody. Rather, he complained that he had been illy and inhumanely treated in the matter of food and of dental and medical treatment, and that he had been confined to the "isolation block", "hole", or "black

hole". He asserted that doctors in attendance were subservient to the wishes of others and were not seriously concerned with the welfare of the patients. His complaint alleged other matters, all of which related to the personal treatment he habitually or occasionally received at the hands of authorities in charge of the prisons and a large part of his petition was devoted to narrative of asserted severe treatment to others. In that case this Court concluded on page 720 that:

> "The petition on its face clearly indicates that the gist of petitioner's complaint is that the manner of his treatment is unnecessarily harsh and is painful and injurious to him. We have seen that the writ of habeas corpus is not the vehicle to carry his appeal for relief."

Similar allegations of unconstitutional mistreatment by prison authorities causing physical and mental harm were made by the petitioner in *Williams v. Steele, supra.* The Court reviewed the history of the writ of habeas corpus, and concluded at page 918 that "the extent of the application of the writ has not been further extended to embrace the correction of alleged unconstitutional mistreatment by prison authorities subsequent to valid judgment and commitment." The United States Supreme Court denied certiorari in both the *Snow* and the *Williams* cases.

The appellant herein, just as the petitioners in the *Williams* and *Snow* cases, *supra,* does not allege illegal detention and does not ask to be released therefrom. In the petition for habeas corpus filed in the District Court, the appellant alleges that he has been mistreated by the prison authorities and has suffered physically

and mentally from such mistreatment. Nowhere in the whole petition does he challenge the legality and validity of his custody. Nowhere does he ask the court to release him. In fact, on page V of his appellate brief he states:

> "The appellant is not seeking personal relief, but merely judicial review of the agencies' abuse of their delegated authority . . . . The motivation for this action is to prevent, if possible, further irreparable damage to others."

The appellee respectfully submits that the *Williams* and *Snow* cases, *supra,* are directly in point and controlling. Clearly a petition for habeas corpus is not the proper means for obtaining the relief the petitioner is seeking. The denial of the petition was therefore proper, and should be upheld.

B. The Only Proper Respondent in a Petition for Writ of Habeas Corpus Is the Person Who Has Physical Custody of the Prisoner.

A minor point, which should nevertheless be raised for the sake of correctness, is that all the respondents named in the appellant's petition for habeas corpus except G. V. Richardson, Warden for the U. S. Correctional Institution at Lompoc, California, are improper respondents. Clearly, the only proper respondent in a petition for a writ of habeas corpus is the person who has actual physical custody of the prisoner, namely, the warden. *Jones v. Biddle,* 131 F. 2d 853 (8th Cir. 1942), cert. den. 318 U. S. 784. In *Jones v. Biddle, supra,* the court granted a motion to dismiss a petition for habeas corpus on the ground that the respondent Attorney General had only supervisory custody and did

not have physical custody of the prisoner. The same rationale would apply to all of the respondents named by the appellant except Warden Richardson. Thus, even if appellant had a right to a writ of habeas corpus, his petition would have to be dismissed as against all respondents except the warden.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the order of the District Court, denying appellant's Petition For a Writ of Habeas Corpus, should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

DONALD A. FAREED,
Assistant U. S. Attorney,
Chief, Civil Section,

DZINTRA I. JANAVS,
Assistant U. S. Attorney,
Attorney for Appellees.

Certificate.[1]

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANCIS C. WHELAN,
United States Attorney,

DONALD A. FAREED,
Assistant U. S. Attorney,
Chief, Civil Section,

DZINTRA I. JANAVS,
Assistant U. S. Attorney,
Attorney for Appellees.

---

[1]A signed certificate as set forth above has been filed with the Court in this cause.